No. 89-243

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ELI LILLY AND COMPANY,

Petitioner,

v.

MEDTRONIC, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

MEMORANDUM OF RESPONDENT MEDTRONIC, INC. IN OPPOSITION TO THE MOTION OF SENATOR HATCH AND REPRESENTATIVE MOORHEAD FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

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Respondent, Medtronic, Inc., hereby opposes the motion of Senator Orin Hatch and Representative Carlos Moorhead for leave to file their brief of *amici curiae* in support of the petition of Eli Lilly and Company for a writ of certiorari. The proposed brief contains little but the private *post hoc* views of the individual legislators and is therefore an unreliable vehicle for determination of the intent of the full Congress at the time of enactment of 35 U.S.C. § 271(e)(1). This Court has consistently discounted briefs and affidavits from legislators offered in support of private litigants. Continuation of this policy is proper to dissuade other litigants from attempting to enlist individual legislators to support their causes in the courts.

Although purporting to describe the views of the entirety of the 1984 Congress, the proposed *amici* brief is an improper attempt to add new evidence to the record that closed with the enactment of section 271(e)(1). It is, in essence, the private affidavit of two legislators attempting to give testimony on the beliefs and positions of hundreds of others. This Court has already held that even the *post hoc* statements of an entire congressional committee are entitled to little weight. *Weinberger v. Rossi,* 456 U.S. 25, 35 (1982). The views of *individual* committee members are entitled to even less; they can shed no light upon the intent of the full Congress that enacted the legislation much earlier. *Southeastern Community College v. Davis,* 442 U.S. 397, 411 n.11 (1979).

Moreover, it is immaterial whether Senator Hatch was one of the authors of the statute in question or whether he and Representative Moorhead were among its proponents. In *Bread PAC v. Federal Election Comm.,* 455 U.S. 577 (1982), this Court refused to give any weight to an affidavit submitted by the senator who had introduced the legislation, despite ambiguity in the statutory language and the legislative history:

> [T]he appellants have submitted to this Court affidavits from Senator Buckley and David A. Keene, the Executive Assistant to the Senator who prepared the original draft of § 437h, expressing the belief that the amendment was not intended to exclude organizations from challenging the constitutionality of the Act. . . .
>
> We cannot give probative weight to these affidavits, however, because "[S]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act.' "

Bread PAC, 455 U.S. at 582, n.3 (citations omitted). Similarly, in *Blanchette v. Connecticut Gen. Ins. Corp.,* 419 U.S. 102 (1974), where an *amicus* brief was filed on behalf of thirty-six Congressmen, this Court stated:

> But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress

> expressed before the Act's passage. See, e.g., *United States v. Mine Workers of America,* 330 U.S. 258, 282 (1947). Such statements "represent only the personal views of these legislators, since the statements were [made] after passage of the Act." *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 639 n. 34 (1967).

Blanchette, 419 U.S. at 132.

Furthermore, there is already evidence in the public record that demonstrates that the views of Senator Hatch and Representative Moorhead do not reflect the views or intent of other members of the 1984 Congress. Senator DeConcini has declared in the Senate that the Federal Circuit was correct and that its decision below did interpret section 271(e)(1) as Congress had originally intended. 135 CONG. REC. S3390 (daily ed. April 5, 1989). Senator DeConcini is the Chairman of the Patent, Copyright and Trademark subcommittee of the Senate Judiciary Committee, of which Senator Hatch is a member. Senator DeConcini's comments cast great doubt on the professed ability of the *amici* here to speak on behalf of other members of the 1984 Congress and on their purported knowledge as to what that Congress intended. In all events, the merits of conflicting senatorial views should be decided in the halls of Congress, not at the bar of this Court.

The appropriate disposition here is to deny the motion for leave to file. Private litigants before this Court should not feel the need to enlist the aid of individual legislators to champion their view of the legislative intent of Congress. The Court's acceptance of *amicus* briefs such as this one, however, would suggest that the Court in fact gives consideration to these privately solicited views. Where, as here, the submitted brief is limited to an expression of personal opinion, which has no bearing on the real issue of the earlier intent of the full legislature, it would be consistent with the Court's policy of according such a view no weight to reject this brief entirely.

In conclusion, it is respectfully requested that the motion of Senator Hatch and Representative Moorhead for leave to file

their *amici* brief in support of the petition for certiorari be denied and their proffered views be disregarded.

Respectfully submitted,

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